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No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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SHOWA DENKO K.K.,
*Petitioner,*

v.

SYLVIA HILL, *et al.*,
*Respondents.*

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**Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment permits the exercise of personal jurisdiction over a foreign defendant based solely on that defendant's placement of a product into the stream of commerce.

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Donald Hill as the Committee for Sylvia Hill was a plaintiff in the state circuit court and appellant in the state supreme court of appeals. Showa Denko America, Inc., P. Leiner Nutritional Products, Inc., P. Leiner Nutritional Products Corp., Rite Aid Corporation, and Rite Aid of West Virginia, Inc. were defendants in the state circuit court.

The following information is provided under Rule 29.1 of the Rules of this Court:

Petitioner Showa Denko K.K. has no parent companies. Its subsidiaries, other than wholly-owned subsidiaries, are as follows:

TOKUYAMA PETROCHEMICAL CO., Ltd.
TSUKUSAKI KYODO DORYOKU K.K.
KYODO LIGHT METAL TRADING CO., Ltd.
SHOWA ENGINEERING CO., Ltd.
SHUNAN TECHNO-CHROME PRIVATE LIMITED COMPANY
PRIVATE LIMITED COMPANY MEDIX SHOWA
NIIGATA SHOWA K.K.
SHOWA ALUMINUM ALLOY K.K.
SHOWA DISTRIBUTION K.K.
KEIHIN KOATSU GAS KYGYO K.K.
SUNNY HOMES K.K.
SHUNAN DENKO K.K.
KOSAI AUTO GAS K.K.
SHOTIC CORPORATION
NAGOYA KENMAZAI KOGYO K.K.
PACIFIC HYDROGEN CO., Ltd.
FUYO LITE CO., LTD.
SHOWA KANKYO SHISUTEMU K.K.
ASIAN MACHINE PTE LTD
ERU EMU TUSHO K.K.
SHOWA SETSUSI SABISU K.K.
KYODO LIGHT METAL SINGAPORE PTE LTD.
KYOSAN KEIKINZOKU YUGENKAISHA

HYMOLD PTE LTD
JOOTOO LIGHT METAL K.K.
FUYO RAITO KOGYO K.K.
TAIWAN CHAOYANG CHEMICAL CO., LTD.
SHOWA GAS BUTSURYU K.K.
HYMOLD (THAILAND) PTE LTD
HYMOLD TOOLING PTE LTD.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT | 3 |
| REASONS FOR GRANTING THE WRIT | 8 |
| CONCLUSION | 13 |
| APPENDIX A | |
| Opinion and order of the Supreme Court of Appeals of West Virginia | 1a |
| APPENDIX B | |
| Opinion and order of the Circuit Court of Kanawha County | 19a |

## TABLE OF AUTHORITIES

CASES — Page

*Andrews Univ. v. Robert Bell Indus.*, 685 F. Supp. 1015 (W.D. Mich. 1988) ..... 11
*Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) ..... 6, 7, 8, 9
*Baton Indus. v. Dimatic Die & Tool Co.*, 801 F.2d 1283 (11th Cir. 1986) ..... 10
*Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (5th Cir. 1984) ..... 11
*Boit v. Gar-Tec Prods.*, 967 F.2d 671 (1st Cir. 1992) ..... 10
*Bond v. Octagon Process, Inc.*, 926 F.2d 1573 (11th Cir.), *aff'g* 745 F. Supp. 710 (M.D. Ga. 1990), *cert. denied*, 111 S. Ct. 2855 (1991) ..... 10, 12
*Brand v. Menlove Dodge*, 796 F.2d 1070 (9th Cir. 1986) ..... 11
*Calder v. Jones*, 465 U.S. 783 (1984) ..... 8
*Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 508 A.2d 1127 (1986) ..... 11
*Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9 (1st Cir. 1986) ..... 10
*DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981) ..... 10
*DeMoss v. City Market, Inc.*, 762 F. Supp. 913 (D. Utah 1991) ..... 12
*Dehmlow v. Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992) ..... 11
*Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369 (8th Cir. 1990) ..... 10
*Federal Ins. Co. v. Lake Shore Inc.*, 886 F.2d 654 (4th Cir. 1989) ..... 10, 12
*Ford Motor Co. v. Atwood Vacuum Mach. Co.*, 392 So. 2d 1305 (Fla. 1981) ..... 11
*Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987) ..... 11
*Gould v. P.T. Krakatau Steel*, 957 F.2d 573 (8th Cir.), *cert. denied*, 113 S. Ct. 304 (1992) ..... 10
*Hanson v. Denckla*, 357 U.S. 235 (1958) ..... 9

TABLE OF AUTHORITIES—Continued

Page

*Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355 (9th Cir. 1983), *modified on other grounds*, 733 F.2d 1335 (1984) ..... 11, 12
*Humble v. Toyota Motor Co.*, 727 F.2d 709 (8th Cir. 1984) ..... 10
*Hutson v. Fehr Brothers, Inc.*, 584 F.2d 833 (8th Cir.) (en banc), *cert. denied*, 439 U.S. 983 (1978) ..... 10
*International Shoe Co. v. Washington*, 326 U.S. 310 (1945) ..... 7
*Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989) ..... 11
*Keckler v. Brookwood Country Club*, 248 F. Supp. 645 (N.D. Ill. 1965) ..... 7
*In re L-tryptophan*, Docket No. 865 (J.P.M.D.L. Dec. 7, 1990) ..... 5
*Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985) ..... 10
*Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737 (2d Cir. 1985) ..... 11
*Narco Avionics, Inc. v. Sportsman's Market, Inc.*, 792 F. Supp. 398 (E.D. Pa. 1992) ..... 10
*Nelson v. Park Indus.*, 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984) ..... 11
*Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980) ..... 11
*Parry v. Ernst Home Center Corp.*, 779 P.2d 659 (Utah 1989) ..... 11, 12
*Poyner v. Erma Werke Gmbh*, 618 F.2d 1186 (6th Cir.) *cert. denied*, 449 U.S. 841 (1980) ..... 11
*Shaffer v. Heitner*, 433 U.S. 186 (1977) ..... 8
*Showa Denko K.K. v. Pangle*, 202 Ga. App. 245, 414 S.E.2d 658 (1991), *cert. denied*, 1992 Ga. LEXIS 188 (Ga. 1992) ..... 12
*Summers County Citizens League v. Tassos*, 367 S.E.2d 209 (W. Va. 1988) ..... 8
*Volkswagenwerk, A.G. v. Klippan*, 611 P.2d 498 (Alaska) *cert. denied*, 449 U.S. 974 (1980) ..... 11

TABLE OF AUTHORITIES—Continued

Page

*Witbeck v. Bill Cody's Ranch Inn*, 411 N.W.2d 439 (Mich. 1987) ..... 11
*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) ..... 9

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. XIV ..... *passim*
W. Va. Const. art. 8, § 4 ..... 8

STATUTES

28 U.S.C. § 1257(a) ..... 1, 8
W. Va. Code § 31-1-15 ..... 5
W. Va. Code § 56-3-33(a) ..... 5, 6

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**Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner Showa Denko K.K. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

## OPINIONS BELOW

The opinion of the state supreme court (App., *infra*, 1a-16a) is reported at 425 S.E.2d 609. The opinion of the state circuit court (App., *infra*, 19a-32a) is unreported.

## JURISDICTION

The judgment of the state supreme court was entered on December 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Section 31-1-15 of the West Virginia Code provides, in pertinent part:

> The secretary of state is hereby constituted the attorney-in-fact for and on behalf of every corporation created by virtue of the laws of this State and every foreign corporation authorized to conduct affairs or do or transact business herein pursuant to the provisions of this article, with authority to accept service of notice and process on behalf of every such corporation and upon whom service of notice and process may be made in this State for and upon every such corporation. . . .
>
> * * * *
>
> For the purpose of this section, a foreign corporation not authorized to conduct affairs or do or transact business in this State pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein . . . (c) if such corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within this State notwithstanding the fact that such corporation had no agents, servants or employees or contacts within this State at the time of said injury. . . .

Section 56-3-33(a) of the West Virginia Code provides, in pertinent part:

> (a) The engaging by a nonresident or by his duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7) of this subsection shall be deemed equivalent to an appointment by such nonresident of the secretary of state,

> or his successor in office, to be his true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him, in any circuit court in this State, . . .:
>
> * * * *
>
> (4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; . . . .

## STATEMENT

1. Petitioner Showa Denko K.K. is a Japanese corporation headquartered in Tokyo, Japan. Petitioner's common stock is not listed on any exchange outside of Japan, and none of petitioner's securities is listed or traded on any exchange in the United States. Petitioner manufactures petrochemicals, ceramics, and other chemicals. Petitioner operates no manufacturing facilities outside of Japan. Petitioner has no office or other place of business in the United States, nor is petitioner authorized to do business anywhere in the United States. Petitioner therefore files no income tax returns in the United States. Moreover, petitioner maintains no bank accounts in the United States, has no outstanding indebtedness for money borrowed in the United States, and owns or leases no real property in the United States. App., *infra*, 5a, 22a.

During the 1980s, petitioner manufactured in Japan bulk L-tryptophan, an essential amino acid. Petitioner did not process L-tryptophan for retail sale or sell it at retail outside of Japan. Rather, petitioner sold the bulk L-tryptophan to customers, including customers located outside of Japan, which sold it to other companies which either resold the product in bulk or formulated it into a form ready for human consumption. App., *infra*, 23a.

Petitioner's only United States customer for bulk L-tryptophan was its wholly-owned subsidiary, Showa

Denko America, Inc. ("SDA"). Petitioner sold bulk L-tryptophan to SDA in Japan on C.I.F. terms under orders SDA placed with it. SDA, in turn, located, selected, and negotiated prices with its own customers in the United States for resale of the bulk L-tryptophan product SDA purchased from petitioner. SDA's customers included various distributors, which resold the product in bulk, and formulators, which processed the bulk raw material L-tryptophan into dietary supplements in the form of capsules and tablets. Neither petitioner nor SDA exercised any control over the distribution of the L-tryptophan after sale by SDA. In 1989, the last year in which the product was sold, sales of L-tryptophan from petitioner to SDA accounted for only approximately 0.1% of petitioner's total sales that year. App., *infra*, 23a-24a.

2. Respondent Sylvia Hill, a West Virginia resident, alleges that she contracted a rare illness, recently identified as eosinophilia-myalgia syndrome ("EMS"), as a result of her ingestion of the dietary supplement L-tryptophan in late 1988 and 1989. In August 1990, respondent (by her Committee) filed a damages action in West Virginia state circuit court against those firms alleged to be involved in the chain of distribution of the L-tryptophan she had ingested, including Rite-Aid, from which she had bought L-tryptophan tablets in West Virginia; P. Leiner Nutritional Products, a California processor and distributor of L-tryptophan and other nutritional products, including some of those ultimately sold by Rite-Aid; SDA, P. Leiner's source of bulk L-tryptophan in 1989; and petitioner, the manufacturer of the bulk L-tryptophan purchased by SDA. App., *infra*, 4a-5a.[1]

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[1] In November 1989, after the reported association of L-tryptophan ingestion with the outbreak of EMS in the United States, SDK ceased production of L-tryptophan and directed SDA to cease sales. The United States Food and Drug Administration thereafter requested a nationwide recall of products containing L-tryptophan. App., *infra*, 4a-5a.

Hundreds of product liability actions have been filed nationwide in federal and state courts against petitioner and distributors and

In October 1990, petitioner filed a motion to dismiss for lack of personal jurisdiction. Petitioner contended that its lack of minimum contacts with the State of West Virginia prohibited the exercise of jurisdiction under the West Virginia long-arm statutes, W. Va. Code §§ 31-1-15 and 56-3-33, and the Due Process Clause of the Fourteenth Amendment. App., *infra*, 21a. Among other things, petitioner established by affidavit that it has made no direct sales of L-tryptophan or any other product in West Virginia in 1989 or any recent year, that it has placed no advertising in West Virginia publications or other West Virginia media, and that petitioner's sole United States customer, SDA, had never sold L-tryptophan to any customers in West Virginia or made any shipments of L-tryptophan to West Virginia. App., *infra*, 22a-24a.

3. In June 1991, the state circuit court granted petitioner's motion to dismiss, holding that there was no statutory or constitutional basis for asserting personal jurisdiction over petitioner in the context of this lawsuit. App., *infra*, 19a-32a. Turning first to the state long-arm statute and the prerequisite of sufficient contacts with the forum, the court found:

> [Petitioner] manufactured raw L-tryptophan in Japan and sold it to SDA, which sold the raw L-tryptophan to *others* who processed it and manufactured capsules and tablets that may have made their way to West Virginia. [Petitioner] made no sales of its bulk L-tryptophan product in West Virginia. . . . SDA sold the raw L-tryptophan to *others* who processed it and manufactured capsules and tablets.

App., *infra*, 26a (emphasis in original). These "uncontroverted facts," the court held, "compell[ed] the conclu-

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retailers of products containing L-tryptophan. The federal cases have been consolidated for pretrial purposes in a multidistrict proceeding before Judge Matthew Perry of the District of South Carolina. *See In re L-tryptophan*, Docket No. 865 (J.P.M.D.L. Dec. 7, 1990).

sion that [petitioner] does not have a relationship with West Virginia in any of the three ways required by [W. Va. Code § 56-3-33(a)(4)]." App., *infra*, 26a-27a. The court also rejected the exercise of jurisdiction under W. Va. Code § 56-3-33(a)(5) because petitioner's "remote relationship to West Virginia consumers [showed that petitioner] could have had no reasonable expectation that its L-tryptophan would be used in West Virginia." App., *infra*, 27a.

Turning next to the inquiry under the Due Process Clause, the court stated that the Constitution "'require[s] something more than that the defendant was aware of its product's entry into the forum state through the stream of commerce in order for the state to grant jurisdiction over the defendant.'" App., *infra*, 28a (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 111 (1987) (plurality opinion)). The court concluded that

> [t]he factual record before [it] is devoid of any facts upon which to conclude that [petitioner] purposefully availed itself of the benefits of West Virginia law or that [petitioner] engaged in any kind of affirmative activity directed toward this state.

App., *infra*, 29a. The court thus held that respondents had "not shown that [petitioner] has had systematic and continuous contacts with West Virginia sufficient to comply with the minimum contacts requirements embodied in the Due Process Clause." App., *infra*, 31a.

Finally, the court found that because petitioner "did not sell L-tryptophan to anyone in West Virginia nor did it sell to anyone who did so . . ., and [petitioner] did not advertise or solicit sales of L-tryptophan in West Virginia . . ., it is readily apparent that there was no purposeful conduct of [petitioner] establishing a 'substantial connection' with West Virginia." App., *infra*, 31a. The court therefore held that the "exercise of personal jurisdiction over [petitioner] would not comport with 'tradi-

tional [n]otions of fair play and substantial justice.'" App., *infra*, 32a (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

4. In December 1992, the West Virginia Supreme Court of Appeals reversed without disturbing the circuit court's findings of fact. App., *infra*, 1a-16a. Because the supreme court of appeals concluded that the state's long-arm statutes were satisfied, the court necessarily proceeded to decide whether the Due Process Clause precluded the exercise of jurisdiction. *See* App., *infra*, 11a-15a.

In the supreme court of appeals, respondents urged the court to adopt "the stream of commerce theory for establishing minimum contacts." App., *infra*, 7a-8a (citing *Keckler v. Brookwood Country Club*, 248 F. Supp. 645, 649 (N.D. Ill. 1965)). The West Virginia court noted that this Court, in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), had "split on whether placing a product into the stream of commerce, without more, was sufficient to allow the forum state to exercise personal jurisdiction over the manufacturer of a defective product." App., *infra*, 9a. The court distinguished *Asahi* factually because petitioner here owns SDA, the American company that imported its product to the United States, whereas there was no such relationship between the parties in *Asahi*. App., *infra*, 11a; *see* App., *infra*, 14a. The court also noted that petitioner derived, in its view, "substantial revenue from the L-tryptophan purchased and used in West Virginia." App., *infra*, 15a.

The court then followed the concurrence of Justice Brennan in *Asahi*, and held that

> [p]ersonal jurisdiction "premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause" and can be exercised without the need to show additional conduct by the defendant aimed at the forum state.

App., *infra*, 3a (syl. pt. 2 quoting *Asahi*, 480 U.S. at 117 (Brennan, J., concurring));[2] App., *infra*, 16a. Based on that holding and its conclusions that "West Virginia has a substantial and legitimate interest in exercising personal jurisdiction," App., *infra*, 15a, and that it was not otherwise unreasonable to do so, App., *infra*, 15a, the supreme court of appeals held that the West Virginia courts could exercise jurisdiction over petitioner without violating the Due Process Clause of the Fourteenth Amendment, App., *infra*, 15a-16a.

## REASONS FOR GRANTING THE WRIT

This case presents the issue that divided the Court in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987), namely, whether personal jurisdiction may be established *solely* by placing a product into the stream of commerce and "without the need to show additional conduct by the defendant aimed at the forum state." App., *infra* 3a, 16a. That recurring issue has divided the lower federal and state courts. Moreover, the issue has substantial practical significance. Since the decision below has squarely adopted the stream-of-commerce theory in the context of an unambiguous factual record, further review is warranted.[3]

1. By grounding personal jurisdiction on an unadorned stream-of-commerce analysis, the West Virginia court decided the issue that divided this Court in *Asahi*. In her plurality opinion in *Asahi*, Justice O'Connor, for four

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[2] In West Virginia, the supreme court of appeals is required to prepare a syllabus "of the points adjudicated in each case," W. Va. Const. art. 8, § 4, and the syllabus with the attached opinion constitutes the court's holding, *see Summers County Citizens League v. Tassos*, 367 S.E.2d 209, 214 (W. Va. 1988).

[3] The decision of the supreme court of appeals is a "final judgment or decree" for purposes of this Court's review under 28 U.S.C. § 1257(a). *See Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977).

Members of the Court, rejected the stream-of-commerce analysis of the lower courts: "[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." 480 U.S. at 112. Conversely, Justice Brennan, in a separate opinion for four Justices, concluded that such conduct would suffice to establish personal jurisdiction. *Id.* at 117.

This Court has never sustained the exercise of personal jurisdiction based solely on placement of an article into the stream of commerce. To the contrary, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), this Court concluded, over Justice Brennan's dissent, that the stream-of-commerce analysis did not permit Oklahoma courts to exercise personal jurisdiction over New York sellers of an automobile driven to Oklahoma by the purchasers. *See id.* at 295. *World-Wide Volkswagen* reaffirmed the holding of *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), that "[t]he unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State" and that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." *See World-Wide Volkswagen*, 444 U.S. at 297-98. In contrast, the court below would permit the exercise of personal jurisdiction over any non-resident in the chain of distribution of a product "without the need to show additional conduct by the defendant aimed at the forum state." App., *infra*, 3a, 16a.

The relaxation of the constitutional limitations on personal jurisdiction staked out by the decision below—but never endorsed by a majority of this Court—calls for further review.

2. The federal courts of appeals and state appellate courts are in sharp conflict over the issue presented.

whether the stream-of-commerce theory provides a sufficient basis for the exercise of personal jurisdiction. The Fourth Circuit has rejected "an unadorned 'stream of commerce' theory," *Federal Ins. Co. v. Lake Shore Inc.*, 886 F.2d 654, 659 (1989), and held that "[a] 'stream of commerce' theory of personal jurisdiction, therefore, cannot supplant the requirement that a defendant purposefully avail itself of forum law," *id.* at 658. Similarly, the Eighth Circuit has held that the mere "placement of a product into the stream of commerce, without more, does not constitute an act of the defendant purposefully directed toward the forum State," *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 376 (8th Cir. 1990) (citing *Asahi*, 480 U.S. at 112 (plurality)). *See also Gould v. P.T. Krakatau Steel*, 957 F.2d 573, 576 (8th Cir.), *cert. denied*, 113 S. Ct. 304 (1992); *Humble v. Toyota Motor Co.*, 727 F.2d 709, 710-11 (8th Cir. 1984); *Hutson v. Fehr Brothers, Inc.*, 584 F.2d 833, 837 (8th Cir.) (en banc), *cert. denied*, 439 U.S. 983 (1978).

The First, Third, and Eleventh Circuits also have refused to ground jurisdiction solely on the act of placing a product into the stream of commerce. *See Boit v. Gar-Tec Prods.*, 967 F.2d 671, 681-83 (1st Cir. 1992); *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9, 15 (1st Cir. 1986); *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 298-300 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285-86 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Narco Avionics, Inc. v. Sportsman's Market, Inc.*, 792 F. Supp. 398, 403-05 (E.D. Pa. 1992) (discussing Third Circuit law); *Bond v. Octagon Process, Inc.*, 926 F.2d 1573, 1573 (11th Cir.), *aff'g* 745 F. Supp. 710, 714 (M.D. Ga. 1990), *cert. denied*, 111 S. Ct. 2855 (1991); *Banton Indus. v. Dimatic Die & Tool Co.*, 801 F.2d 1283, 1284-85 (11th Cir. 1986).

On the other hand, the Fifth, Seventh, and Ninth Circuits have generally embraced the stream-of-commerce

theory. *See Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 385-86 (5th Cir.), *cert. denied*, 493 U.S. 823 (1989); *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1084-85 (5th Cir. 1984); *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 199-200 (5th Cir. 1980); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992); *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 667-68 (7th Cir. 1986), *cert. denied*, 479 U.S. 1092 (1987); *Nelson v. Park Indus.*, 717 F.2d 1120, 1125-27 (7th Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984); *Hedrick v. Daiko Shoji Co.*, 715 F.2d 1355, 1359 (9th Cir. 1983), *modified on other grounds*, 733 F.2d 1335 (1984). *But see Brand v. Menlove Dodge*, 796 F.2d 1070, 1075 (9th Cir. 1986) (rejecting pure stream-of-commerce theory under particular facts).

The Second and Sixth Circuits have appeared willing to employ the stream-of-commerce theory under certain circumstances. *See Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 742-43 (2d Cir. 1985); *Poyner v. Erma Werke Gmbh*, 618 F.2d 1186, 1190-92 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980); *Andrews Univ. v. Robert Bell Indus.*, 685 F. Supp. 1015, 1019 (W.D. Mich. 1988) (noting uncertainty in Sixth Circuit after *Asahi*).

This divergence of views—both before and after *Asahi* —is present in the state courts as well. *Compare Volkswagenwerk, A.G. v. Klippan*, 611 P.2d 498, 500-02 (Alaska) (accepting the stream-of-commerce theory), *cert. denied*, 449 U.S. 974 (1980); *Ford Motor Co. v. Atwood Vacuum Mach. Co.*, 392 So. 2d 1305, 1311-13 (Fla. 1981) (accepting the theory); *and Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460, 477-81, 508 A.2d 1127, 1136-37 (1986) (accepting the theory) *with Witbeck v. Bill Cody's Ranch Inn*, 428 Mich. 659, 411 N.W.2d 439, 448-50 (1987) (rejecting the theory), *and Parry v. Ernst Home Center Corp.*, 779 P.2d 659, 666-67 (Utah 1989) rejecting the theory).

The conflict among the lower courts has substantial practical significance, leading to strikingly conflicting results in cases involving similar facts. For example, the Fourth Circuit has held that the stream-of-commerce theory could not support a claim of purposeful conduct to permit South Carolina to exercise jurisdiction over a manufacturer of a winch that failed on a ship after it had sailed to South Carolina. *Federal Ins. Co. v. Lake Shore Inc.*, 886 F.2d at 658-60. But in a very similar case, the Ninth Circuit held that, under the stream-of-commerce theory, Oregon could exercise jurisdiction over a manufacturer of a wire-rope splice that failed on a ship once it had arrived at an Oregon port. *Hedrick v. Daiko Shoji Co.*, 715 F.2d at 1359. These decisions are irreconcilable.[4]

This sharp and recurring conflict concerning the validity of the stream-of-commerce theory—with the attendant uncertainty and confusion that burden commerce and the courts—remains in the wake of *Asahi* and calls for this Court's review.

3. This is an appropriate case in which to resolve the controversy surrounding the stream-of-commerce theory. There are explicit findings of fact by the trial court that were not disturbed on appeal. From that record, it is

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[4] Petitioner has been subjected to this sort of conflict. In Utah, for example, the United States District Court denied petitioner's motion to dismiss in *DeMoss v. City Market, Inc.*, 762 F. Supp. 913 (D. Utah 1991). But in doing so, the court declined to follow the Utah Supreme Court's decision in *Parry v. Ernst Home Center Corp.*, 779 P.2d 659, 667 (Utah 1989), which rejected the stream-of-commerce theory. *See* 762 F. Supp. at 918 n.2. Similarly, in *Showa Denko K.K. v. Pangle*, 202 Ga. App. 245, 414 S.E.2d 658, 662 (1991), *cert. denied*, 1992 Ga. LEXIS 188 (Ga. 1992), the state court upheld jurisdiction over petitioner and rejected the views of the United States District Court for the Middle District of Georgia in *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710 (M.D. Ga. 1990), *aff'd*, 926 F.2d 1573 (11th Cir.), *cert. denied*, 111 S. Ct. 2855 (1991), an opinion that followed Justice O'Connor's plurality opinion in *Asahi* and that the Eleventh Circuit adopted on appeal.

undisputed that petitioner did not engage in any conduct purposefully directed toward West Virginia. The facts relied upon by the supreme court of appeals—petitioner's ownership of its subsidiary, SDA, and the economic benefits to petitioner from the sale by others of L-tryptophan products in West Virginia—do not reflect forum-focused conduct. Accordingly, it was necessary for the West Virginia courts, as it would be for this Court, to decide whether in the absence of such conduct jurisdiction may be predicated solely on the placement of an article into the stream of commerce.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 12, 1993

# APPENDICES

**APPENDIX A**

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1992 Term

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No. 20904

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SYLVIA HILL, BY HER COMMITTEE, DONALD HILL; and
DONALD HILL, COMMITTEE FOR SYLVIA HILL,
*Plaintiff Below,*
*Appellants,*

v.

SHOWA DENKO, K.K., A JAPANESE CORPORATION; SHOWA DENKO AMERICA, INC., A NEW YORK CORPORATION; P. LEINER NUTRITIONAL PRODUCTS, INC., OF DELAWARE, A DELAWARE CORPORATION; P. LEINER NUTRITIONAL PRODUCTS, INC., OF CALIFORNIA, A CALIFORNIA CORPORATION; RITE AID CORPORATION, A DELAWARE CORPORATION; RITE AID OF WEST VIRGINIA, INC., A WEST VIRGINIA CORPORATION,
*Defendants Below,*

SHOWA DENKO, K.K., A JAPANESE CORPORATION,
*Appellee*

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Appeal from the Circuit Court of Kanawha County
Honorable John Hey, Judge
Civil Action No. 90-C-3098

REVERSED

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Submitted: September 22, 1992

Filed: December 17, 1992

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JUSTICE BROTHERTON delivered the Opinion of the Court.

## SYLLABUS BY THE COURT

1. "The standard of jurisdictional due process is that a foreign corporation must have such minimum contacts with the state of the forum that the maintenance of an action in the forum does not offend traditional notions of fair play and substantial justice." Syllabus Point 1, *Hodge v. Sands Manufacturing Company*, 151 W.Va. 133, 150 S.E.2d 793 (1966).

2. Personal jurisdiction "premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause" and can be exercised without the need to show additional conduct by the defendant aimed at the forum state. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).

Brotherton, Justice:

This case involves the appeal of Sylvia and Donald Hill from the June 18, 1991, order of the Circuit Court of Kanawha County in which Showa Denko K.K. (SDK) was dismissed from a lawsuit filed by the Hills against SDK and several other parties. In that order, Judge Hey found that West Virginia could not exercise personal jurisdiction over SDK.

On December 22, 1988, Sylvia Hill became ill while taking a drug L-tryptophan for a sleep disorder, on the advice of her physician. It was eventually discovered that she had developed a rare blood disorder, Eosinophilia-Myalgia Syndrome (EMS). Mrs. Hill is currently in a nursing home and unable to walk, sit up, or care for herself. On August 22, 1990, the appellants filed suit against the appellees in Kanawha County Circuit Court.

Through discovery, it was elicited that L-tryptophan is an essential amino acid which was until recently sold over the counter, and commonly used to help with insomnia, premenstrual syndrome, weight control, pain relief, and depression. In November, 1989, the FDA issued a recall of products containing L-tryptophan after hearing reports of at least 1500 EMS cases, including twenty-seven deaths, in which the only factor common to those cases was that those who contracted the disease had taken products containing L-tryptophan. It was subsequently discovered that it was not the L-tryptophan itself which caused the disease, but rather a contaminated L-tryptophan product. According to a New England Journal of Medicine article, the contaminated L-tryptophan was traced to SDK. The article determined that the contamination occurred when SDK converted to a less expensive method of manufacturing L-tryptophan, and apparently omitted some of the purification process.

Also named in the suit was Rite-Aid Pharmacies, from whom Mrs. Hill obtained her prescription of L-tryptophan. Rite-Aid received their supply of L-tryptophan

from P. Leiner Nutritional Products, an American processor and distributor of drug and health food products. In 1988, Leiner obtained its supply of raw L-tryptophan from four suppliers. One of them was Showa Denko America, Inc. (SDA), a wholly owned subsidiary of SDK and SDK's sole American distributor for the raw materials it manufactures. In 1989 Leiner obtained all of its bulk raw L-tryptophan from SDA.

SDK owns 100% of SDA stock. One of SDA's three corporate directors is an employee of SDK. SDA's principal business is the purchase, importation, and resale of SDK's products for sale in the United States, and maintains warehouses in California and New Jersey. In 1989, SDA purchased over $10.1 million of products from SDK for resale in the United States. SDK is a Japanese corporation with its headquarters in Tokyo. The corporation's stock is traded only on the Japanese stock exchanges and not in the United States. All of their manufacturing and research facilities are in Japan, and they have no offices or places of business in the State of West Virginia or in the United States. SDK states that it owns no real property in the United States and does not file tax returns with the United States Internal Revenue Service or the West Virginia Tax Department. SDK's business falls into three general categories: (1) petrochemicals, (2) ceramics and materials, and (c) [sic] chemicals and carbon. The sales of L-tryptophan fall into the third category.

In its discovery responses, the appellants point out that SDA admitted that when it learned of the possible link between their product and the disease EMS, it immediately notified SDK. After investigation, SDK ordered SDA to "cease immediately any further sales of L-tryptophan."

On October 9, 1990, SDK filed a motion to dismiss the claim against it on grounds of lack of personal jurisdic-

tion and insufficiency of service of process.[1] On April 5, 1991, a hearing was held on the motion to dismiss. The parties submitted proposed findings of fact and conclusions of law on the issue of whether there was sufficient personal jurisdiction over SDK. On June 18, 1991, Judge John Hey found that there was not sufficient personal jurisdiction over SDK and thus, SDK was dismissed from the suit. The appellants filed this petition for appeal from that final ruling and urge this Court to adopt the stream of commerce theory of establishing personal jurisdiction.

Our analysis of personal jurisdiction must begin with a review of the United States Supreme Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In *International Shoe*, the Supreme Court first set forth the elements necessary to subject a nonresident defendant to the jurisdiction of the forum state:

> [I]n order to subject a defendant to a judgment if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

*Id.* at 316. The Court noted that "the quality and nature of the activity in relation to the fair and orderly administration of the laws" is the critical element rather than the volume of the activity. *Id.* at 319. Defining "minimum contacts" has been an ongoing process for the Court, made especially complex in recent years by the increase in international trade.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), the Supreme Court further defined the concept of minimum

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[1] The objection to service of process was eventually mooted and is not before this Court.

contacts and ruled that jurisdiction cannot be asserted over a defendant with which a state has no contacts, no ties, and no relations. *Id.* at 294. In order to satisfy due process, the Court held that "the defendant's conduct in connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *Id.* at 297. In setting the limits necessary to establish reasonable contacts, the Supreme Court commented that:

> The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." (Citations omitted.) Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum state's interest in adjudicating the dispute, *see McGee v. Inter. Life. Ins. Co.*, 355 U.S. 220, 223, 2 L.Ed.2d 223, 78 S.Ct. 199 (1957), the plaintiff's interest in obtaining convenient and effective relief, *see Kulko v. California Superior Court*, *supra*, [436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed. 2d 132 (1978)], at least when that interest is not adequately protected by the plaintiff's power to choose the forum, *cf. Shaffer v. Heitner*, 433 U.S. 186, 211 n.37, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977), the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, *see Kulko v. California Superior Court*, [436 U.S. at 93, 98, 98 S.Ct. 1690, 1700, 56 L.Ed.2d 132, 142, 145 (1978)].

*Id.* at 292.[2]

The appellant urges this Court to adopt the stream of commerce theory for establishing minimum contacts as

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[2] *See also Hanson v. Denkcla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

defined in *Keckler v. Brookwood Country Club*, 248 F. Supp. 645 (N.D.Ill. 1965):

> When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is surprised at being held to answer in *any* state for the damage the product causes.

*Id.* at 649. The appellants contend that a number of states have adopted this theory and urge this Court to adopt it as well.[3]

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[3] *See Cunningham v. Subaru of American, Inc.*, 631 F.Supp. 132 (D.Kan. 1986), in which the plaintiff claimed that he was injured as a result of the design, manufacture and distribution of the Subaru Brat truck. The defendant, a Japanese corporation, had designed, manufactured and sold Subaru trucks to the defendant, Subaru of America, Inc., in Tokyo. Thus, the defendant maintained that its only contact with the United States was the sale of these vehicles in Tokyo and that it had no "minimum conacts" sufficient to support an exercise of jurisdiction in the forum state. The federal court disagreed:

> While Fuji [the defendant] greatly profits from the sale of Subaru Brat vehicles in the United States, it claims that it is immune from all jurisdictional claims against it in the United States. The court views this as a company which seeks to reap all of the benefits without incurring the resulting liabilities and costs . . . . The court finds that Kansas' interest in asserting jurisdiction over Fuji in this action is substantial. Any inconvenience to defendant in defending this lawsuit is clearly outweighed by Kansas' interest in protecting its citizens from injury. The court finds that it would be fundamentally unfair to allow a foreign manufacturer to insulate himself from the jurisdiction of this court by use of an exclusive distributor.

*Id.* at 136. The court then dismissed the defendant's motion to dismiss for lack of personal jurisdiction.

*See also Warren v. Honda Motor Co., Ltd.*, 669 F.Supp. 365 (D.Utah 1987); *Welkener v. Kirkwood Drug Store Co.*, 734 S.W.2d 233 (Mo.App. 1987); *Wessinger v. Vetter Corp.*, 685 F.Supp. 769 (D.Kan. 1987).

The United States Supreme Court addressed the stream of commerce theory of personal jurisdiction in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). *Asahi* involved Japanese tire valve assemblies manufactured in Japan and sold to several tire manufacturers, including a Taiwanese company. The sale took place in Taiwan. The Taiwanese company then sold the completed tires all over the world, including the United States. In 1978, an accident occurred in California involving a tire manufactured by the Taiwanese company. Shortly thereafter, the driver filed suit in California against the Taiwanese company, who filed a cross-claim for indemnity against the Japanese company (Asahi), among others. The driver later settled his claims against the defendants, leaving only the cross-claim between the Taiwanese and Japanese companies.

Although the *Asahi* Court split on whether placing a product into the stream of commerce, without more, was sufficient to allow the forum state to exercise personal jurisdiction over the manufacturer of a defective product, three [sic] members of the Court stated, in Part II-A, that mere awareness on the part of the manufacturer that the product had entered into the stream of commerce was not an act of the manufacturer "purposefully directed toward the forum state." [4] *Id.* at 112. However,

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[4] In Part II-A, four justices concurred that "[t]he 'substantial connection,' (citations omitted) between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed towards the forum State . . . . The placement of a product into the stream of commerce, without more, is not an act directed toward the forum State." *Id.* at 112. In order to show an intent to direct the products towards the forum State, the Court lists specific examples: "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.*

four members of the Court, led by Justice Brennen [sic], determined that the defendant had satisfied the minimum contacts test found in *International Shoe* because it put goods in the stream of commerce that the defendant knew would lead into the forum state.

In his concurrence, Justice Brennan stated that the requirement in Part II-A of some additional conduct aimed at the forum state is inconsistent with *World-Wide Volkswagen* and unnecessary:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.

*Id.* at 117.

Under the particular facts of *Asahi*, a majority of the Court found that exercise of personal jurisdiction by California over the foreign corporation was unreasonable and unfair, and violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 116. In making the decision, the Court looked to the burden on the defendant,

the interests of the forum state, and the plaintiff's interest in obtaining relief. Specifically, the Court found that California had virtually no interest in the maintenance of an indemnity action between Japanese and Taiwanese corporations, the only parties left in the lawsuit at that point, and that the burden on the Japanese company was severe. The Court also noted that the plaintiff's interest was slight at best, since he had settled the suit out of court and all that remained was an action between the two foreign codefendants. Finally, the Supreme Court found that *Asahi* "did not create, control or employ the distribution system that brought its valves to California," since it sold its valves in Taiwan rather than in the United States. *Id.* at 112.

The facts in the case now before us are different from those found in *Asahi*. In *Asahi*, the Japanese valve manufacturer corporation was a separate entity from the Taiwanese company, which purchased the valves and then sold the completed tires in the United States. No evidence was presented which would connect the two foreign corporations. In this case, SDA is a wholly-owned subsidiary of SDK, with SDK ordering SDA when to stop selling the defective product. Based upon the reasoning found in *World-Wide Volkswagen* and *Asahi*, our next step is to determine what burdens are placed on SDK by exercising personal jurisdiction, and on the plaintiff by refusing to exercise jurisdiction over SDK. We also must analyze the plaintiff's interest in obtaining speedy and convenient relief, the shared interests of the states in furthering fundamental social policies, and what interests exist on the part of the forum state—West Virginia —in West Virginia's exercise of jurisdiction over SDK.

West Virginia's long-arm statute authorizes the exercise of personal jurisdiction where a foreign corporation sells, offers for sale, or supplies a defective product within the state which causes injury in West Virginia. Specifically, W.Va. Code § 31-1-15 (1988) provides, in part:

> For the purpose of this section, a foreign corporation not authorized to conduct affairs or transact business in this State pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein . . . (c) if such a corporation manufactures, sells, offers for sale or supplies any product in a defective condition and such product causes injury to any person or property within the State notwithstanding the fact that such corporation has no agents, servants, or employees or contacts within this State at the time of said injury.[5]

Although W.Va. Code § 31-1-15 permits the exercise of jurisdiction over a nonresident, a certain amount of minimum contacts with West Virginia is required to avoid violation of constitutional restraints found in *World-Wide Volkswagen Corp. v. Woodson, supra.* "The standard of jurisdictional due process is that a foreign corporation must have such minimum contacts with the state of the forum that the maintenance of an action in the forum does not offend traditional notions of fair play and substantial justice." Syllabus Point 1, *Hodge v. Sands Manufacturing Company*, 151 W.Va. 133, 150 S.E.2d 793 (1966). In *Kidwell v. Westinghouse Electric Co.*, 178 W.Va. 161, 358 S.E.2d 420 (1986), this Court emphasized that:

> W.Va. Code, 31-1-15 . . . includes in the concept of doing business, the making of a contract, the committing of a tort, in whole or in part, in this State, or the selling of a defective product in this State. We do not believe that after *World-Wide Volkswagen* such an exclusive test can be relied upon to constitute doing business sufficient for *in personam* jurisdiction. As we emphasized in *City of Fairmont*, the test must look to the minimum contacts standard.

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[5] Subsection (c) is an addition to the statute enacted by the Legislature in 1969.

*Id.* at 422. *See also Harmon v. Pauley*, 522 F.Supp. 1130, 1135 (S.D.W.Va. 1981); *S.R. v. City of Fairmont*, 167 W.Va. 880, 280 S.E.2d 712 (1981).

A second long-arm statute, W.Va. Code § 56-3-33(a)(4) (1992), permits the exercise of personal jurisdiction within the following parameters:

> (4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;

The federal court for the Northern District of West Virginia analyzed W.Va. Code § 56-3-33(a)(4) in *Hinzman v. Superior Toyota, Inc.*, 660 F.Supp. 401 (N.D. W.Va. 1987). The court divided W.Va. Code § 56-3-33 (a)(4) into two basic requirements necessary to exercise jurisdiction: (1) a tortious injury in West Virginia that is caused by an out of state act or omission, and (2) a relationship between the defendant and West Virginia exists in any of the three manners specified in subsection (4). *Id.* at 402. Thus, if the company regularly does or solicits business in West Virginia, engages in another persistent course of conduct, or derives substantial revenue from goods used or consumed in West Virginia, then personal jurisdiction would extend out of West Virginia. The appellees, of course, argue that SDK has no relationship with West Virginia based on either W.Va. Code §§ 31-1-15 or 56-3-33(a)(4). We disagree.[6]

This Court declined to exercise personal jurisdiction in two prior cases involving out-of-state defendants.

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[6] In *Showa Denko K.K. v. Pangle*, 414 S.E.2d 658 (Ga.App. 1991), *cert. denied* (1992), the Georgia court affirmed the trial court's denial of SDK's motion to dismiss for lack of personal jurisdiction. In *Pangle*, the Georgia court found that SDK was subject to the Georgia long-arm jurisdiction based upon the tortious acts of its agent and that the exercise of personal jurisdiction did not offend due process. *Id.* at 568.

*Hodge v. Sands Manufacturing Co.*, 151 W.Va. 133, 150 S.E.2d 793, 800 (1966), involved a foreign corporation which manufactured component parts of hot water heaters which were eventually shipped into and sold in West Virginia. The Court held that local courts could not exercise personal jurisdiction over a foreign defendant that was not authorized to do business in the State and had no representatives in the State, had not maintained a place of business in the State, had not entered into any contracts to be performed by any party to such contracts within the State, did not own property within the State, and had not appointed anyone to accept process within the State. Similarly, in *Chase v. Greyhound Lines, Inc.*, 158 W.Va. 382, 211 S.E.2d 273 (1975), the Court ruled that a West Virginia court could not exercise personal jurisdiction over an out-of-state defendant where that defendant was not licensed to do business in the State, made no contracts to be performed in whole or in part in the State, was not doing business in the State, committed no tort in the State, had no employees or agents in the State, owned no property within the State, had not manufactured, sold, offered for sale, or supplied a product causing injury within the State, did not appoint anyone to accept process in the State, and had contact only in that its product entered the State as a component of another's product.

Contrary to SDK's argument, the facts in this case are distinct from *Hodge* and *Chase*. In *Hodge*, the Court ruled that "the determination of the existence of minimum contacts essential to confer jurisdiction upon a court of the state of the forum depends upon the specific facts of each particular case . . . ." *Id.* at 802. Unlike this case, *Hodge* did not involve an establishment of a distribution system for its product through the mechanism of a wholly owned subsidiary. The use of the wholly owned subsidiary enabled SDK to run all their United States distribution of L-tryptophan through that company. Further, SDK admitted that once they realized the problem with

the L-tryptophan, they ordered SDA to halt distribution. We fail to see how much more control SDK could have over SDA.

Like the federal district court's analysis of W.Va. Code § 56-3-33(a)(4) in *Hinzman*, we note that SDK derived substantial revenue from the L-tryptophan purchased and used in West Virginia. Although SDK denied that it solicited business in West Virginia, SDA clearly did. Further, under the analysis set forth in *World-Wide Volkswagen* and affirmed in *Asahi*, we determine that West Virginia has a substantial and legitimate interest in exercising personal jurisdiction over SDK, the company that manufactured and sold the contaminated L-tryptophan. Likewise, the burden on the plaintiff would be substantial since SDK, rather than SDA, has the information related to the manufacturing process. SDK's assertions that this need on the part of the plaintiff could be satisfied by open communication between SDA and SDK merely reinforces our conviction that the true authority in this relationship is SDK, not the shell corporation, SDA. The burden of SDK submitting to jurisdiction in the United States and West Virginia would be minimal since SDK has already gone through the effort of setting up SDA in the United States. They have obviously found doing business in the United States to be profitable enough to create SDA. We fail to see how defending these suits in the United States would be a greater burden. By contrast, requiring the plaintiff to travel to Japan to litigate this case would create a substantial burden. Consequently, we conclude that "notions of fair play and substantial justice" require us to exercise personal jurisdiction over SDK. *International Shoe*, 326 U.S. at 316.

Moreover, under Justice Brennan's analysis in *Asahi*, *supra*, SDK benefitted from its contacts with West Virginia regardless of whether it directly conducts business in or directed toward West Virginia. We conclude that

personal jurisdiction "premised on the placement of a product into the Stream of Commerce is consistent with the Due Process Clause," and can be exercised without the need to show additional conduct by the defendant aimed at the forum state. *Asahi*, 480 U.S. at 117. Given the distribution pattern of the product, this and the many other lawsuits filed as a result of the use of the contaminated L-tryptophan cannot come as a surprise. Accordingly, we reverse the decision of the Circuit Court of Kanawha County and hold that SDK is subject to the long arm jurisdiction of West Virginia and the United States Supreme Court's decisions in *International Shoe*, *World-Wide Volkswagen*, and *Asahi*.

Reversed.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of December, 1992, the following order was made and entered:

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No. 20904

SYLVIA HILL, by her Committee, DONALD HILL, and DONALD HILL, Committee for SYLVIA HILL,
*Plaintiffs Below,*
*Appellants*

vs.

SHOWA DENKO, K. K., a Japanese corporation; SHOWA DENKO AMERICA, INC., a New York corporation; P. LEINER NUTRITIONAL PRODUCTS, INC., OF DELAWARE, a Delaware corporation; P. LEINER NUTRITIONAL PRODUCTS CORP., a California corporation; RITE AID CORPORATION, a Delaware corporation; and RITE AID OF WEST VIRGINIA, INC., a West Virginia corporation,
*Defendants Below*

SHOWA DENKO, K. K., a Japanese corporation,
*Defendant Below,*
*Appellee*

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The Court, having maturely considered the transcript of the record and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in the judgment of the Circuit Court of Kanawha County, rendered on the 18th day of June, 1991. It is therefore considered and ordered by the Court that said judgment be, and the same hereby is, set aside, reversed and annulled, and that the appellants, Sylvia Hill, by her Committee, Donald Hill, and Donald Hill, Committee for Sylvia Hill, to re-

cover of and from the appellee, Showa Denko, K. K., a Japanese corporation, their costs about the prosecution of their appeal in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Kanawha County.

The syllabus of points adjudicated, prefixed to the written opinion aforesaid, prepared by Justice Brotherton, was concurred in by Chief Justice McHugh and Justices Workman, Neely and Miller.

A True Copy

Attest: /s/ Ancil H. Ramey
Clerk
Supreme Court of Appeals

## APPENDIX B

IN THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

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Civil Action No. 90-C-3098

SYLVIA HILL, by her Committee, DONALD HILL, and DONALD HILL, Committee for SYLVIA HILL,
*Plaintiffs,*

v.

SHOWA DENKO, K. K., a Japanese corporation; SHOWA DENKO AMERICA, INC., a New York corporation; P. LEINER NUTRITIONAL PRODUCTS, INC., OF DELAWARE, a Delaware corporation; P. LEINER NUTRITIONAL PRODUCTS CORP., a California corporation; RITE AID CORPORATION, a Delaware corporation; and RITE AID OF WEST VIRGINIA, INC., a West Virginia corporation,
*Defendants.*

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### ORDER

On April 5, 1991, came the parties before this Court for a hearing on the motion of Defendant, Showa Denko, K.K. ("SDK") to dismiss the claims against it for lack of personal jurisdiction. After hearing arguments of counsel, the Court directed the parties to submit proposed findings of fact and conclusions of law in relation to the motion.

After a thorough review of the record, as well as the briefs and responsive memoranda filed by the parties in this matter, the Court hereby adopts by reference the attached proposed findings of fact and conclusion of law submitted by the Defendant SDK.

THEREFORE, the Court hereby grants the motion to dismiss of Defendant SDK. The Court notes the objection and exception of the parties aggrieved by this Order. The Court ORDERS that a certified copy of this order be sent to all parties or counsel of record.

DATED this the 17 day of June, 1991.

ENTER:

/s/ John Hey
JOHN HEY
Judge

IN THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA

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Civil Action No. 90-C-3098

SYLVIA HILL, by her Committee, DONALD HILL, and DONALD HILL, Committee for SYLVIA HILL,
*Plaintiffs,*

vs.

SHOWA DENKO, K. K., a Japanese corporation; SHOWA DENKO AMERICA, INC., a New York corporation; P. LEINER NUTRITIONAL PRODUCTS, INC., OF DELAWARE, a Delaware corporation; P. LEINER NUTRITIONAL PRODUCTS CORP., a California corporation; RITE AID CORPORATION, a Delaware corporation; and RITE AID OF WEST VIRGINIA, INC., a West Virginia corporati n,
*Defendants.*

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## FINDINGS OF FACT AND CONCLUSIONS OF LAW RESPECTING DEFENDANT SHOWA DENKO K.K.'S MOTION TO DISMISS

Defendant Showa Denko K.K. ("SDK") filed a motion to dismiss the claims against it for lack of personal jurisdiction and supporting brief on October 10, 1990, pursuant to W. Va. R. Civ. P. 12(b)(2). SDK contested this Court's assertion of personal jurisdiction over it on the basis of lack of minimum contacts with the State of West Virginia sufficient to satisfy the pertinent West Virginia long-arm statute and constitutional due process.[1]

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[1] SDK also moved to dismiss the claims against it on grounds of insufficiency of service of process. SDK was served with the Summons and Complaint by the Tokyo District Court on November

SDK supported its motion with the affidavits of Mr. Ichiro Nomura, Deputy Chief Manager of the Legal Department and Corporate Planning Department of SDK (the "Nomura Affidavit"), and of Mr. Koji Yanai, President of Showa Denko America, Inc., which affidavits have not been controverted by the plaintiffs. The Court held a hearing on this motion on April 5, 1991, and now enters the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. SDK is a Japanese corporation with its headquarters located in Tokyo, Japan. Nomura Affidavit ¶ 4.

2. The common stock of SDK is not listed on any stock exchange outside of Japan, and no securities of SDK are listed or traded on any stock exchange in the United States. Nomura Affidavit ¶ 4.

3. SDK operates no manufacturing facilities outside of Japan. Nomura Affidavit ¶ 5.

4. SDK is not authorized to do business and has no office or other place of business in the State of West Virginia or elsewhere in the United States. Nomura Affidavit ¶ 6.

5. SDK maintains no bank accounts in the United States, has no outstanding indebtedness for money borrowed in the United States, and owns or leases no real property in the United States. Nomura Affidavit ¶ 6.

6. SDK files no tax returns in the United States. Nomura Affidavit ¶ 6.

7. SDK has placed no advertising in West Virginia publications or other West Virginia media. Nomura Affidavit ¶ 6.

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14, 1990 in apparent compliance with the Hague Service Convention. Accordingly, SDK's objection to sufficiency of service of process has been mooted. *See* Transcript of Hearing of April 5, 1991, pg. 6.

8. SDK owns all of the stock of Showa Denko America, Inc. ("SDA"), a New York corporation. Nomura Affidavit ¶ 11.

9. SDK made no direct sales in West Virginia in 1989 or any recent year of L-tryptophan or any other product. Nomura Affidavit ¶ 14.

10. SDK personnel have not visited West Virginia in any recent year. Nomura Affidavit ¶ 15.

11. SDK manufactured bulk L-tryptophan in Japan and did not process L-tryptophan for retail sale or sell it at retail outside Japan. Nomura Affidavit ¶ 18.

12. SDK exercised no control over its bulk L-tryptophan product after selling it to its customers outside Japan. Nomura Affidavit ¶ 18.

13. SDK's only United States customer for its bulk L-tryptophan product was SDA. Nomura Affidavit ¶ 17.

14. SDK sold bulk L-tryptophan to SDA on C.I.F. terms pursuant to orders SDA placed with SDK. Nomura Affidavit ¶ 19.

15. SDA located, selected, and negotiated the prices with customers in the United States for the bulk L-tryptophan product SDA purchased from SDK. Nomura Affidavit ¶ 19.

16. SDA usually stored the bulk L-tryptophan it purchased from SDK at warehouses leased by SDA in California and New Jersey. Nomura Affidavit ¶ 19.

17. SDA sold the bulk L-tryptophan to various distributors and formulators, which processed the raw material and manufactured capsules and tablets. Nomura Affidavit ¶ 20.

18. SDK and SDA had no control over, and usually no knowledge of, the distribution route of the bulk L-tryptophan after its sale by SDA. Nomura Affidavit ¶ 20.

19. SDA made shipments of L-tryptophan in 1989 to customer locations in New Jersey, New York, Michigan, South Carolina, California, Connecticut, Florida, Illinois and Oregon. Nomura Affidavit ¶ 21.

20. SDA has never sold L-tryptophan to any customers in West Virginia or made any shipments of L-tryptophan to West Virginia. Nomura Affidavit ¶ 21.

21. In 1989, sales of food grade L-tryptophan from SDK to SDA accounted for only approximately 0.1% of SDK's total sales that year. Nomura Affidavit ¶ 17.

## CONCLUSIONS OF LAW

### *Introduction*

1. This court must first determine whether SDK falls within the scope of the West Virginia long-arm statute and, if so, whether that scope exceeds the constraints of federal constitutional due process. *Hardy v. Pioneer Parachute Co.*, 531 F.2d 193, 195 (4th Cir. 1976); *Hinzman v. Superior Toyota*, 660 F. Supp. 401, 402 (N.D. W.Va. 1987). Plaintiff bears the burden of demonstrating that this Court has personal jurisdiction over SDK. *See Wyatt v. Kaplan*, 686 F.2d 276, 280, *reh'g denied*, 712 F.2d 1002 (5th Cir. 1982). Plaintiffs may not rely on unsupported factual assertions in their complaint to attempt to controvert SDK's evidence presented by affidavit. *See, e.g., Wolf v. Richmond County Hospital Authority*, 745 F.2d 904, 908 (4th Cir. 1984), *cert. denied*, 474 U.S. 826 (1985).

### *West Virginia Long-Arm Statute*

2. This Court may not exercise personal jurisdiction over SDK in the absence of a statutory basis. *See, e.g., Weir-Cove Bakery, Inc. v. Universal Oven Co.*, 518 F. Supp. 383, 385 (N.D. W.Va. 1981). Of West Virginia's two long-arm statutes, W. VA. CODE § 56-3-33 governs the determination of whether SDK is subject to personal jurisdiction here.

3. The only conceivably relevant portions of W. VA. CODE § 56-3-33 permit the exercise of jurisdiction with respect to the following acts:

> (4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
>
> (5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume or be affected by the goods in this State: Provided, That he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
> . . .

W. VA. CODE § 56-3-33(a)(4)-(5). Furthermore, an action may be brought against a non-resident "only [for] a cause of action arising from or growing out of one or more of the acts specified" above. *Id.* § 56-3-33(b).

4. Section 56-3-33(a)(4) has two essential requirements. First, a tortious injury in this state caused by an out-of-state act or omission and second, a relationship between the defendant and this state in one of the three ways recited in subsection (4): doing or soliciting business in the state, engaging in some other persistent course of conduct in the state, or deriving substantial revenue from goods used or consumed in the state. *Hinzman v. Superior Toyota, Inc.*, 660 F. Supp. 401, 402 (N.D. W.Va. 1987).

5. SDK's lack of contacts with this state do not satisfy the statutory requirements for the exercise of personal jurisdiction. This case is governed by two pre-

vious decisions of the West Virginia Supreme Court of Appeals which found no personal jurisdiction over an out-of-state supplier of constituent parts of products alleged to have caused injury in this state. *Hodge v. Sands Manufacturing Co.*, 151 W. Va. 133, 150 S.E.2d 793, Syl. pt. 2 (1966) (no personal jurisdiction where out-of-state defendant was not authorized to do business in West Virginia, had no representative in state, had not done business or maintained a place of business in state, had not entered into any contracts in state, owned no property in state, had not appointed an attorney in fact for acceptance of process, and had otherwise not engaged in persistent course of conduct or other transactions in state); *Chase v. Greyhound Lines, Inc.*, 211 S.E. 2d 273, 276-77 (W. Va. 1975) (no personal jurisdiction where out-of-state defendant was not licensed to do business and was not doing business in West Virginia, had no contracts to be performed in state, had not committed a tort in state, had no employees or agents in state, owned no property in state, had not appointed attorney in fact to accept process in state, had not manufactured or sold the product that caused injury in the state, and only contact with state was that its product entered the state as a component part of another party's product).

6. The rationale of *Hodge* and *Chase* respecting the lack of personal jurisdiction over an out-of-state supplier of a constituent product applies equally to SDK's status in this case. Significantly, SDK manufactured raw L-tryptophan in Japan and sold it to SDA, which sold the raw L-tryptophan to *others* who processed it and manufactured capsules and tablets that may have made their way to West Virginia. SDK made no sales of its bulk L-tryptophan product in West Virginia. *See* Factual Findings 9, 11, 13, and 17. SDA sold the raw L-tryptophan to *others* who processed it and manufactured capsules and tablets. *See* Factual Finding 17.

7. The uncontroverted facts, as set forth in the Nomura Affidavit and as found by this Court, compel the con-

clusion that SDK does not have a relationship with West Virginia in any of the three ways required by § 56-3-33(a)(4). SDK has never done or solicited business in this state, or engaged in any other persistent course of conduct, or derived substantial revenue from goods sold or services rendered in West Virginia, within the meaning of § 56-3-33(a)(4). *See* Factual Findings 7, 9-15, and 17-20.

8. Personal jurisdiction over SDK likewise cannot be predicated on § 56-3-33(a)(5) because that subsection, like § 56-3-33(a)(4), requires that the defendant do business in, derive substantial revenue from, or engage in some other persistent course of conduct in the state, none of which can be found here.

9. Two other requirements of subsection (a)(5) of § 56-3-33 also are not satisfied in this case. First, the section requires that SDK reasonably have expected that Plaintiff would use or consume its goods in West Virginia. Because of SDK's remote relationship to West Virginia consumers (*see* Factual Findings 7, 9, 11-12, 17-18, and 20), SDK could have had no reasonable expectation that its L-tryptophan would be used in West Virginia.

10. Second, an implicit requirement of subsection (a)(5) of § 56-3-33 is privity: The person who purchased the goods and received the warranty from the nonresident defendant must be the same person who was injured. Although nothing in the record suggests that SDK made any warranties, even if it had, SDK was not in privity with Plaintiffs.

11. Plaintiffs have not met their burden of establishing that SDK is subject to jurisdiction under W. VA. CODE § 56-3-33(a)(4) and (5). Hence, there is no statutory basis for this Court to exercise personal jurisdiction over SDK.

*Constitutional Due Process*

12. In addition to the West Virginia long arm statute, the Court must consider the restrictions of federal due process in deciding whether it has personal jurisdiction over SDK. For SDK to be subject to personal jurisdiction in this state, the federal constitution requires that SDK have "minimum contacts" with West Virginia such that the exercise of personal jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

13. The out-of-state defendant's contacts and connection with the forum state must be "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Hanson v. Deckla*, 357 U.S. 235, 253 (1958). *See also Federal Insurance Co. v. Lake Shore Inc.*, 886 F.2d 654, 658 (4th Cir. 1989); *Sowards v. Swith Energy Co.*, 744 F. Supp. 1399, 1401 (W.D. Va. 1990).

14. Foreseeability, without more, has never been an adequate basis for exercising personal jurisdiction under the Due Process Clause. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). *See also Federal Insurance Co. v. Lake Shore Inc.*, 886 F.2d 654, 658 (4th Cir. 1989); *Sowards v. Swith Energy Co.*, 744 F. Supp. 1399, 1401 (W.D. Va. 1990).

15. The Due Process Clause "require[s] something more than that the defendant was aware of its product's entry into the forum state through the stream of commerce in order for the state to grant jurisdiction over the defendant." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 111 (1987) (plurality). *See also*

*Federal Insurance Co. v. Lake Shore Inc.*, 886 F.2d 654, 658 (4th Cir. 1989) ("A 'stream of commerce' theory of personal jurisdiction . . . cannot supplant the requirement that a defendant in some way purposefully avail itself of forum law"); *Sowards v. Smith Energy Co.*, 744 F. Supp. 1399, 1403 (W.D. Va. 1990) ("interstate interaction and commerce do not automatically become grounds for the exercise of personal jurisdiction").

16. The factual record before the Court is devoid of any facts upon which to conclude that SDK purposefully availed itself of the benefits of West Virginia law or that SDK engaged in any kind of affirmative activity directed toward this state.

17. There is a strong factual similarity between this case and *Asahi*. As with the out-of-state defendant in *Asahi*, SDK does no business here, has no office, agents, employees or property here, and it does not advertise or otherwise solicit business here. *See* Factual Findings 3-7, 9. Furthermore, the product Plaintiff allegedly consumed was a finished product formulated, processed, and manufactured by others to their own designs from several ingredients, and subsequently distributed through a complex path over which SDK exercised no control. *See* Factual Findings 11-12, 17-18. These factual similarities make the application of the rationale in *Asahi* to this case particularly appropriate.

18. Moreover, this case is a substantially weaker one for the assertion of personal jurisdiction than *Asahi*. SDK was generally unaware of the more distant links in the chain of distribution after sale of the bulk product by SDA. *See* Factual Findings 17-18. In *Asahi*, however, the Supreme Court refused to sustain a holding of personal jurisdiction, although the defendant Japanese manufacturer was specifically aware that its own product was reaching California. *Asahi*, 480 U.S. at 108.

19. Prior decisions of the West Virginia Supreme Court of Appeals also have rejected the "stream of com-

merce" theory of personal jurisdiction, particularly for out-of-state suppliers of component parts of products alleged to have caused injury in this state. *See Chase v. Greyhound Lines, Inc.*, 211 S.E.[2d] 273 (W.Va. 1975); *Hodge v. Sands Manufacturing Co.*, 150 S.E.[2d] 793 (W.Va. 1966).

20. The facts which led the court in *Hodge* to hold that there was no basis for the exercise of personal jurisdiction over the out-of-state defendant are present and warrant the same conclusion in this case. Specifically, SDK was not authorized to do business in West Virginia, SDK had no representatives here, SDK has not done business or maintained a place of business here, SDK has not entered into any contracts relating to activities in this state, SDK owns no property here, and SDK has not appointed anyone to accept service of process in this state. *See* Factual Findings 3-7, 9.

21. SDK's status in this case is also similar to that of the out-of-state defendant in *Chase* which manufactured a component part of a third party's product that allegedly caused injury in West Virginia. SDK is not licensed to do business, is not doing business here, has made no contract to be performed here, has no servants, agents, or employees here, owns no property here, has not appointed anyone to accept service of process here, and has not manufactured, sold, offered for sale or supplied a product causing injury to personal property in West Virginia. *See* Factual Findings 3-7, 9, 11, 13.

22. The case chiefly relied upon by Plaintiffs, *S.R. v. City of Fairmont*, 280 S.E.2d 712 (W.Va. 1981) is inapposite. *S.R.* was a medical negligence case, not a products liability case. *S.R.* affirmed and relied upon *Hodge* and *Chase*; it did not overrule them. Moreover, the court in *S.R.* emphasized the contractual relationship between the foreign corporation and the West Virginia plaintiff, and also noted that the foreign corporation derived an economic benefit from the solicitation efforts

of a related party for business from West Virginia. *Id.* at 716-17. No such facts or circumstances appear in the record of this case. Finally, the court's concern with potential difficulties of proof in the context of a negligence action, *id.* at 718, does not pertain to this case, where Plaintiffs rely principally upon joint and several strict products liability.

23. Plaintiff has not shown that SDK has had systematic and continuous contacts with West Virginia sufficient to comply with the minimum contacts requirements embodied in Due Process Clause. Accordingly, the Court could exercise personal jurisdiction over SDK under the Due Process Clause only if this litigation arose out of contacts of SDK with West Virginia that concern L-tryptophan sales. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

24. The precise issue before the Court is whether there is a sufficient connection among *this* defendant, *this* forum, and *this* litigation, *Shaffer v. Heitner*, 433 U.S. 186, 204 (1978), and whether *this* litigation is predicated upon "contacts [that] proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) (emphasis in original).

25. Because SDK did not sell L-tryptophan to anyone in West Virginia nor did it sell to anyone who did so (*see* Factual Findings 9, 13, 20), and SDK did not advertise or solicit sales of L-tryptophan in West Virginia (*see* Factual Findings 7), it is readily apparent that there was no purposeful conduct of SDK establishing a "substantial connection" with West Virginia.

26. The Court must also consider such factors as the burden on SDK to litigate here and West Virginia's interest in the controversy to ascertain whether the assertion of personal jurisdiction over SDK would comport

with "fair play and substantial justice." *Asahi*, 480 U.S. at 113. These considerations are heightened in an action involving a non-U.S. defendant. *Id.* at 115.

27. Because SDK is a Japanese corporation whose headquarters and manufacturing and research facilities are located in Japan, the burden on SDK to litigate in West Virginia would be substantial.

28. The tremendous burden that would be placed on SDK if it had to litigate in this forum greatly outweighs West Virginia's and Plaintiffs' interests. The interests of Plaintiffs and West Virginia are fully protected by pursuing this action against those entities who may have actually been responsible for distribution and sale of the product in West Virginia. *See Asahi*, 480 U.S. at 115.

29. In summary, Plaintiffs have not shown that SDK has had sufficient contacts with West Virginia to meet the requirements of the Due Process Clause. Accordingly, the exercise of personal jurisdiction over SDK would not comport with "traditional motions [sic] of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

*Conclusion*

In light of the Court's determination that both the West Virginia long-arm statute and the Due Process Clause prohibit the exercise of personal jurisdiction over SDK, the Court grants SDK's motion to dismiss.

DATED this the 17th day of June, 1991.

ENTER:

/s/ John Hey
JOHN HEY
Judge